# Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-270-1996
KAMALANATHAN RATNAM JC
18 MARCH 1997

***Civil Procedure*** *— Injunction — Mareva injunction — Application to discharge injunction — Whether duty to make full and frank disclosure when making ex parte application for injunction complied with — Consequences of non-disclosure — Whether injunction was oppressive in overstating the maximum monetary limit of its coverage — Court's discretion to grant new injunction in place of old*

The plaintiffs were housing developers. The first and second defendants secured or purported to secure a lottery project in the Jilian province of China. The project was to be operated jointly by their company, Golden Glory International Management Services Ltd Hong Kong ('GGIMS') and the Social Welfare and Charity Foundation of Jilian Province. The third defendant was the wife of the second defendant. The fourth defendant was the personal assistant to the group chief executive of Magnum Corp Bhd whereas the fifth defendant was the former chief executive director of Leisure Management Bhd. The defendants offered GGIMS to the plaintiffs as a vehicle to exploit the lottery project and invited the plaintiffs to buy the controlling shares in GGIMS for a sum of US$5m with an additional US$5m as procurement fees to the defendants. The first and third defendants signed a commitment agreement with the plaintiffs on 4 February 1993 wherein the plaintiffs agreed to inject US$22m into GGIMS of which US$5m was to be paid to the first and third defendants as procurement fees. The plaintiffs had also expended more than US$12m in a purchase of a building in Changchun and computers and related equipment through GGIMS. The lottery project, however, was prohibited by the Government of China in March 1993 and this was communicated to the defendants who did not disclose the prohibition to the plaintiffs. The said US$5m was paid to the defendants as procurement fees in March, April and May 1993 and the defendants collected the same despite knowing that the lottery had been prohibited by the Government of China. The plaintiffs only knew of the prohibition in December 1993. GGIMS was subsequently renamed Larut Talam International Services Ltd ('LTI'). The plaintiffs had obtained by way of an ex parte application a Mareva injunction by an order of court dated 11 June 1996. The present application heard inter partes was for the Mareva injunction to be extended until the trial of this action. The plaintiffs alleged that the defendants in wrongful conspiracy with each other conspired to defraud the plaintiffs thereby causing loss and damage to the plaintiffs. The defendants in seeking a discharge of the ex parte Mareva injunction argued, inter alia, that: (i) there was a delay of over three years before the plaintiff sought redress from the court; (ii) there was suppression of materials facts by the plaintiff in the form of non-disclosure of a document; and (iii) the ex

parte order granted was oppressive as it failed to make provisions for the defendants' living expenses and to provide an accurate maximum limit where the plaintiff sought an exact sum.

**Held**, discharging the ex parte Mareva injunction but granting a fresh inter partes Mareva injunction limited to the sum of US$5m:

(1) The mere act of delay, even if there was, was not per se a factor which militated against the granting of an injunction. The facts of each case must be looked into. For delay to operate as a bar, it was essential that it should prejudice the defendants. From the facts of the case, in no way whatsoever were the defendants disadvantaged by the delay. The plaintiffs had raised sufficient evidence to warrant the grant of the ex parte Mareva injunction. The plaintiffs had also satisfactorily explained the delay in that their main cause of action was the tort of conspiracy which ought to be pleaded with great particularity and required sufficient evidence (see p 95B–E).

(2) Order 29 r 2A of the Rules of the High Court 1980 was introduced for a specific purpose and with specific reference to ex parte applications. The need for full and frank disclosure at the ex parte stage had been enshrined in the rules and they must be strictly complied with by the parties and enforced by the courts. The plaintiffs had indeed breached this rule by failing to disclose the existence of a letter whereby the parties had agreed that out of the US$17m that was to be used for the acquisition of assets or working capital, a sum of US$5m was to be paid back to one Dato' Chan, who signed on behalf of the plaintiffs, or to his nominees (see p 97E).

(3) The minutes of the 1996 annual general meeting of LTI held on 10 June 1996 showed that the board of directors of LTI had agreed to dispose of LTI to a third party in order to raise funds to repay its creditors and advances from major shareholders. The minutes also expressed the fact that the board of directors of LTI had, prior to the annual general meeting, already approved the sale. As the Mareva injunction was granted on 11 June 1996, disclosure of these minutes ought to have been made to the court (see p 98B–D); *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 followed.

(4) The Mareva injunction granted was oppressive as the order failed to make provisions for the fourth defendant's living expenses and legal costs and it also overstated the maximum monetary limits of the injunction's intended coverage. It was sound law that a failure to provide for living expenses and for payment of ordinary debts as they become due in an order for a Mareva injunction ought to be valid grounds to discharge that order (see p 100A–D); *Law Society v Shanks* The Times 19 October 1987 [1987] NLJ Rep 1016 and *Derby v Weldon (Nos 3 & 4)* [1990] Ch 65 followed.

(5) Furthermore, in a case where the amount of the claim had been quantified, it was necessary for the order of the court to sufficiently identify the upper limit of the sum that was sought to be protected by the injunction and where a maximum limit was provided for, the maximum limit must, as far as possible, be accurately stated and in any event, certainly not overstated. In the present case, the Mareva injunction order stipulated a maximum monetary limit of RM54m (US$22m) and the plaintiffs' application to continue the injunction made no attempt to reduce this sum. This was a gross overstatement of the exact sum claimable by the plaintiffs by way of special damages in so far as the plaintiffs had failed to disclose the sale which would have reduced this sum to approximately RM9.6m only (see p 101C–D); *Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605 followed.

(6) In the light of the evidence adduced and the non-disclosure of material facts by the plaintiffs, the ex parte injunction granted on 11 June 1996 should be discharged and an enquiry as to damages should be heard after the trial (see p 101I).

(7) There was, however, sufficient evidence before the court that there was a real risk of the defendants dissipating their assets. The plaintiffs had paid out RM5m to the defendants who admitted receipt of this sum. The plaintiffs were public listed companies and the funds were that of the shareholders. It was necessary, notwithstanding the conspiracy or fraud or corrupt practices of the parties to this action, that the funds of the investors be protected. Therefore, a fresh Mareva injunction should be granted against the defendants, limited to the sum of US$5m (see p 102A–C).

**[Bahasa Malaysia summary**

Pihak plaintif merupakan pemaju perumahan. Defendan pertama dan kedua telah mendapatkan atau cuba mendapatkan satu projek loteri di Wilayah Jilian di China. Projek tersebut akan dikendalikan bersama oleh syarikat mereka, Golden Glory International Management Services Ltd Hong Kong ('GGIMS') dan Yayasan Kebajikan Masyarakat dan Amal Wilayah Jilian. Defendan ketiga merupakan isteri defendan kedua. Defendan keempat merupakan pembantu peribadi kepada ketua eksekutif kumpulan Magnum Corp Bhd manakala defendan kelima merupakan bekas ketua pengarah eksekutif Leisure Management Bhd. Defendan-defendan telah menawarkan GGIMS kepada plaintif sebagai alat untuk mengeksploitasikan projek loteri tersebut dan menjemput plaintif untuk membeli saham-saham mengawal GGIMS pada harga AS$5 juta serta tambahan AS$5 juta sebagai yuran pemerolehan kepada defendan. Defendan pertama dan ketiga telah menandatangani satu perjanjian komitmen dengan plaintif pada 4 Februari 1993 di mana plaintif telah bersetuju untuk memasukkan wang sebanyak

AS$22 juta ke dalam GGIMS yang mana AS$5 juta diperuntukkan untuk membayar defendan pertama dan ketiga sebagai yuran pemerolehan. Plaintif juga telah membelanjakan wang sebanyak lebih AS$12 juta untuk membeli sebuah bangunan di Changchun dan komputer dan alatan yang berkaitan melalui GGIMS. Walau bagaimanapun, projek loteri tersebut telah dilarang oleh kerajaan China pada bulan Mac 1993 dan perkara ini telah dimaklumkan kepada defendan yang tidak memberitahu plaintif mengenai larangan tersebut. Wang sebanyak AS$5 juta telah pun dibayar kepada defendan-defendan sebagai yuran pemerolehan pada bulan-bulan Mac, April dan Mei 1993 dan defendan telah mengutip jumlah tersebut walaupun mereka telah tahu bahawa loteri tersebut telah dilarang oleh kerajaan China. Plaintif hanya mendapat tahu mengenai larangan tersebut pada bulan Disember 1993. GGIMS kenudiannya telah ditukar nama kepada Larut Talam International Services Ltd ('LTI'). Plaintif telah memperolehi, melalui suatu permohonan ex parte, satu injunksi Mareva melalui perintah mahkamah bertarikh 11 Jun 1996. Permohonan sekarang yang didengar inter partes adalah untuk perlanjutan injunksi Mareva sehingga perbicaraan tindakan ini. Plaintif telah mengatakan bahawa defendan-defendan di dalam satu persubahatan salah telah berkomplot antara mereka untuk menipu plaintif menyebabkan plaintif menanggung kerugian dan kerosakan. Defendan, dalam memohon agar injunksi Mareva ex parte tersebut dibatalkan, telah berhujah, antara lainnya, bahawa: (i) terdapat kelewatan selama lebih tiga tahun sebelum plaintif memohon tebus rugi dari mahkamah; (ii) terdapat ketakpendedahan fakta-fakta penting oleh plaintif dalam bentuk ketakpendedahan suatu dokumen; dan (iii) perintah ex parte yang diberi bersifat menekan kerana ianya tidak membuat peruntukan bagi perbelanjaan sara hidup defendan dan memperuntukkan had maksima yang tepat di mana plaintif telah menuntut suatu jumlah yang tertentu.

**Diputuskan**, membatalkan injunksi Mareva ex parte tetapi memberi satu injunksi Mareva inter partes baru yang dihadkan kepada AS$5 juta:

(1) Kelewatan membawa tindakan, jikapun ada, bukan dengan sendirinya satu faktor yang akan menyekat pemberian satu injunksi. Fakta-fakta setiap kes mestilah diteliti. Untuk kelewatan menjadi satu penghalang, ianya mestilah sesuatu yang penting yang akan memudaratkan defendan-defendan. Daripada fakta-fakta kes ini, defendan-defendan telah tidak mengalami sebarang kerugian berdasarkan kelewatan ini. Plaintif telah mengemukakan keterangan yang mencukupi untuk menyokong pemberian injunksi Mareva ex parte. Plaintif juga telah menjelaskan dengan memuaskan kelewatan itu memandangkan yang kausa tindakan utama mereka adalah tort persubahatan yang perlu diplikan dengan jitu dan memerlukan keterangan yang mencukupi (lihat ms 95B–E).

(2) Aturan 29 k 2A Kaedah-kaedah Mahkamah Tinggi 1980 telah diperkenalkan untuk tujuan khas dan dengan rujukan khas kepada permohonan ex parte. Keperluan untuk pendedahan yang penuh dan jujur pada peringkat ex parte telah dimasukkan ke dalam kaedah-kaedah tersebut dan ianya mesti dipatuhi dengan ketat oleh semua pihak dan dikuatkuasakan oleh mahkamah. Plaintif telah melanggar kaedah ini bila ia gagal mendedahkan kewujudan suatu surat di mana pihak-pihak telah bersetuju bahawa daripada AS$17 juta yang akan digunakan untuk pengambilan aset ataupun kapital kerja, jumlah AS$5 juta akan dibayar balik kepada seorang bernama Dato' Chan, yang telah menandatangani bagi pihak plaintif, ataupun kepada penerima namaannya (lihat ms 97E).

(3) Minit mesyuarat agung tahunan 1996 LTI yang telah diadakan pada 10 Jun 1996 menunjukkan bahawa lembaga pengarah LTI telah bersetuju menjual LTI kepada pihak ketiga untuk mendapatkan jumlah wang untuk membayar balik pemiutang dan wang pendahuluan daripada pemegang-pemegang sahamnya yang utama. Minit mesyuarat juga menyatakan fakta bahawa lembaga pengarah LTI telahpun meluluskan jualan tersebut sebelum mesyuarat agung tahunan. Oleh kerana injunksi Mareva tersebut telah diberi pada 11 Jun 1996, pendedahan minit mesyuarat tersebut sepatutnya telah dibuat kepada mahkamah (lihat ms 98B–D); *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 diikut.

(4) Injunksi Mareva yang berikan adalah bersifat menindas oleh kerana perintah itu gagal membuat peruntukan untuk perbelanjaan sara hidup dan kos khidmat undang-undang defendan keempat dan ianya juga telah menyatakan secara melampau had kewangan maksima yang hendak dilindungi oleh injunksi tersebut. Adalah undang-undang mantap bahawa kegagalan untuk membuat peruntukan untuk perbelanjaan sara hidup dan bayaran hutang-hutang biasa apabila mereka perlu dibayar dalam suatu perintah injunksi Mareva harus menjadi alasan yang sah untuk membatalkan perintah tersebut (lihat ms 100A–D); *Law Society v Shanks* The Times 19 October 1987 [1987] NLJ Rep 1016 dan *Derby v Weldon (No 3 & 4)* [1990] Ch 65 diikut.

(5) Tambahan lagi, di dalam kes di mana jumlah yang dituntut telah dipastikan, adalah perlu untuk perintah mahkamah mengenalpasti had maksima jumlah yang hendak dilindungi oleh injunksi tersebut dan bila had maksima diperuntukkan, had maksima tersebut mestilah, seboleh mungkin, dinyatakan dengan tepat dan tidak keterlaluan. Di dalam kes ini, perintah injunksi Mareva tersebut telah menetapkan had kewangan maksima sejumlah RM54 juta (AS$22 juta) dan permohonan plaintif untuk melanjutkan injunksi tersebut tidak meminta pengurangan jumlah tersebut. Ini adalah satu pernyataan yang melampau atas jumlah yang boleh dituntut oleh plaintif melalui ganti rugi khas setakat mana plaintif telah gagal mendedahkan jualan yang boleh mengurangkan jumlah ini

kepada lebih kurang RM9.6 juta sahaja (lihat ms 101C–D); *Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605 diikut.

(6) Memandangkan keterangan yang dikemukakan dan ketakpendedahan fakta penting oleh plaintif, injunksi ex parte yang diberikan pada 11 Jun 1996 patut dibatalkan dan satu siasatan tentang ganti rugi didengar selepas perbicaraan (lihat ms 101I).

(7) Namun demikian, terdapat keterangan yang mencukupi bahawa terdapat risiko yang ketara defendan-defendan akan melesapkan aset mereka. Plaintif telah membayar RM5 juta kepada defendan-defendan dan ini telah diakui oleh defendan-defendan. Plaintif adalah sebuah syarikat awam berdaftar dan wangnya adalah wang pemegang-pemegang saham. Adalah perlu, tidak kira terdapat persubahatan atau penipuan atau amalan rasuah oleh pihak-pihak dalam tindakan ini, agar wang pemegang-pemegang saham dilindungi. Maka, satu injunksi Mareva yang baru patut diberi dan dihadkan kepada jumlah RM5 juta (lihat ms 102A–C).]

**Notes**

For a case on application to discharge injunction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1666.

For a case on duty to make full and frank disclosure, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1663.

**Cases referred to**

*Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703 (refd)

*Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83 (refd)

*Aspatra Sdn Bhd & Ors v Bank Bumiputra (M) Bhd & Anor* [1988] 1 MLJ 91 (refd)

*Bank Bumiputra (M) Bhd v Lorrain Osman & Ors* [1985] 2 MLJ 236 (refd)

*CBS UK v Lambert* [1983] Ch 37 (refd)

*Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 (folld)

*Derby v Weldon (No 3 & 4)* [1990] Ch 65 (folld)

*Esa bin Sa'yon v Woon Kim Poh* [1985] 2 CLJ 382 (refd)

*Hj Wan Habib Syed Mahmud v Datuk Patinggi Hj Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198 (refd)

*Law Society v Shanks* The Times 19 October 1987, [1987] NLJ Rep 1016 (folld)

*Lloyds Bowmaker Ltd v Britannia Arrow Holdings* [1968] 3 All ER 178 (refd)

*Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605 (folld)

*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (refd)

*Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143 (refd)

*PCW (Underwriting) Agencies Ltd v Dixon & Anor* [1983] 2 All ER 158 (refd)

A *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 (refd)

**Legislation referred to**

Prevention of Corruption Act 1961 s 4(a)

B Rules of the High Court 1980 O 29 r 2A (d), (e), O 41 r 5(2)

*Joginder Singh* (*CT Anathurai* with him) (*Joginder Singh & Co*) for the plaintiffs.

*Joseph Yeo* (*Andrew Teh* and *M Pala* with him) (*Pala Mutu & Associates*) for the first and fifth defendants.

C *Ranjit Singh* (*HL Ooi* with him) (*Cheang & Ariff*) for the fourth defendant.

*Cur Adv Vult*

**Kamalanathan Ratnam JC:**

D **The action**

The plaintiffs are public companies listed on the Kuala Lumpur Stock Exchange ('the KLSE'). The plaintiffs have sued the defendants for: (i) a Mareva injunction; (ii) disclosure of assets within and without the jurisdiction; (iii) accounts; (iv) the appointment of a receiver; (v) general E and special damages; (vi) interest; and (vii) costs.

For the purposes of these proceedings, the writ has only been served on the first, fourth and fifth defendants ('the defendants'). The main cause of action against the defendants is grounded in the tort of conspiracy to defraud the plaintiffs, thereby causing loss and damage to the plaintiffs. F The plaintiffs had obtained, by way of an ex parte application, a Mareva injunction by an order to this court dated 11 June 1996. The present application (encl 10) heard inter partes is for the Mareva injunction to be extended until the trial of this action.

G **Background facts**

The second defendant, at one time a Malaysian, was at all material times the economic adviser to the Jilian Province of China. He was a very influential person in the province by virtue of his position. The third defendant, a Chinese national, was at all material times the wife of the second defendant. The first defendant is the brother of the second H defendant. Sometime in late 1992, the brothers discussed and/or negotiated with the Social Welfare and Charity Foundation of the Jilian Province ('the foundation') and secured or purported to secure a lottery project in the province of Jilian for their company, Golden Glory International Management Services Ltd Hong Kong ('GGIMS'). In Malaysia, Magnum I Corp Bhd ('Magnum') was and is the licensee to run the 'Empat Nombor Ekor' Lottery ('the lottery') through its subsidiary, Leisure Management Bhd. At all material times, the fourth defendant was the personal assistant to the group chief executive of Magnum. From about mid-February 1993, the fourth defendant was made the executive director of Leisure Management Bhd, replacing the fifth defendant. The fifth defendant has

a doctorate in computer science and is a computer expert. At all material times until about mid-February 1993, the fifth defendant was the executive director of Leisure Management Bhd running and/or operating the lottery. It is not in dispute that the fourth and fifth defendants were connected with the gaming industry and that their expertise lay in the running of lotteries. A

On the other hand, the plaintiffs were at all material times housing developers. The defendants had on various occasions met the second defendant in China and discussed the lottery project with him and the foundation officials. Arising from the discussion, the defendants decided to promote the lottery project to some cash rich companies in Malaysia. From December 1992, the defendants had meetings, discussions and negotiations with the plaintiffs' representatives — namely, Dato' Chan Ah Chye ('Dato' Chan') and Chuah Teik Huat ('Chuah') — regarding the lottery project in Jilian Province, China which the defendants claimed they had secured through the second defendant and invited the plaintiffs to invest in the project in Jilian jointly with the defendants. The defendants offered GGIMS as the vehicle to exploit the lottery project and invited the plaintiffs to buy the controlling shares in GGIMS from the defendants for the sum of US$5m and to participate in the lottery project with the defendants. In addition, the defendants asked for a further sum of US$5m for their trouble in securing the lottery project as procurement fees. A feasibility study of the project was presented to the plaintiffs by the defendants. B C D E

In the meantime, GGIMS entered into a technical assistance agreement ('the TAA') dated 6 January 1993 with the foundation to assist the latter in operating the lottery jointly with GGIMS. The defendants then presented the plaintiffs with a copy of the TAA as confirmation of their representations. The defendants also made arrangements for the plaintiffs to meet with the second defendant and the relevant Chinese authorities for confirmation of the validity of the TAA and the viability of the lottery project in Jilian. The meeting with the second defendant took place in Beijing on 29 January 1993. At a special meeting between the foundation's secretary, Yao Thye Wen ('Yao'), the plaintiffs' delegation, and the defendants, Yao confirmed the validity of the TAA under the laws of China and that the lottery could be launched commercially without a hitch as the government of China had approved the lottery project. F G

The first and the third defendants signed a commitment agreement in Hong Kong on 4 February 1993 with Dato' Chan, who signed on behalf of the plaintiffs. Under the commitment agreement, the plaintiffs agreed, inter alia: (a) to inject US$22m into GGIMS — of which US$5m was to be paid to the first and third defendants as procurement fees and the balance of US$17m to be used for the acquisition of assets or as working capital — and GGIMS undertook to pay the plaintiffs US$22m before any payment of dividends to its shareholders; and (b) to pay the US$5m, being the price of acquiring the controlling shares in GGIMS. On 16 February 1993, the plaintiffs paid the sum of US$5m to the first and the third defendants, who received the sum on behalf of the defendants as the purchase price of the controlling shares in GGIMS. The shareholders' H I

agreement dated 18 February 1993 was then executed by the first and third defendants and the plaintiffs.

However, in March 1993 the government of China came to know of the lottery project and prohibited the lottery. The second defendant was duly informed of the prohibition by the foundation. The plaintiffs, not knowing of this prohibition, carried out their obligation under the commitment agreement and the shareholders' agreement. The plaintiffs paid out US$5m to the defendants as the procurement fees in March, April and May 1993 and the defendants collected the same despite knowing that the lottery had been prohibited by the government of China.

In addition, the plaintiffs expended more than US$12m in the purchase of a building in Changchun and computers and related equipment through GGIMS commencing March 1993 in preparation for the operation of the lottery under the terms and conditions of the TAA, jointly with the foundation.

In July 1993 or thereabouts, the defendants had one James Wong — alleged to be the servant or agent of the first and fifth defendants — present the plaintiffs with the marketing plan to show that preparations for the launch of the lottery were under way.

Only in December 1993 did the plaintiffs discover that the TAA was invalid and that the lottery project had never taken off.

**Case for the plaintiff**

The plaintiffs' case was that the defendants, in wrongful conspiracy with each other, had falsely represented to the plaintiffs that the TAA was in every respect lawful and valid as it had complied with all the regulations and rules of China and that there was nothing else that needed to be done but to launch the lottery immediately. Further, the defendants in wrongful conspiracy with each other had emphatically stated that all that the plaintiffs had to do was just to put in the money and that they — in particular the fourth and fifth defendants — would run the lottery for the plaintiffs as they had the expertise to do so between them. It was contended that the second defendant had, in wrongful conspiracy with the defendants, repeatedly assured the plaintiffs that the TAA was valid according to the laws of China. The plaintiffs further contended that the second defendant had also conspired with Yao, and that the latter had told the plaintiffs' delegation that the TAA was valid and that no further approval of any authority of the government of China was required, when such was not the case. When in March 1993 the government of China came to know of the lottery project and prohibited it, the second defendant — who was duly informed of the prohibition by Yao — kept it secret from the plaintiffs who, blissfully oblivious of the prohibition, continued to perform their part of the bargain. It was also the case of the plaintiffs that the defendants had conspired with each other and collected US$5m as procurement fees from the plaintiffs in March, April and May 1993. In furtherance of their common plan, the defendants conspired with James Wong to present the plaintiffs with the marketing plan of the lottery project so that the plaintiffs would not suspect that anything was amiss. The plaintiffs also had an alternate cause of action in deception and misrepresentation.

MATERIAL ADMISSIONS BY THE FIRST AND FIFTH DEFENDANTS

The plaintiffs pointed out a very pertinent admission by the first defendant who affirmed an affidavit on his behalf and on behalf of the fifth defendant (encl 19), wherein he expressly admitted para 39(d) of the affidavit of Chuah, the executive director of the first plaintiff who also affirmed on behalf of the second plaintiff.

Para 39(d) reads:

> The first and/or the second, the fourth and/or the fifth defendants in wrongful conspiracy with each other falsely assured Dato' Chan Ah Chye and the delegation that the foundation had, with full lawful power and authority, executed the TAA and that the TAA did not violate any laws rules or regulations of China pertaining to the operation of lotteries and/or the said lottery.
>
> The said Yao Thye Wen confirmed the said assurance and/or representation.

There were also the following further pertinent admissions in other affidavits by the first defendant, namely:

(1) that the sum of US$5m was received by the third defendant on 16 February 1993 as being the purchase price of the controlling shares in GGIMS;

(2) that the first and fifth defendants had received shares of both the plaintiffs on behalf of the second defendant;

(3) that US$3.75m being his 75% share in the US$5m was paid to him or to his order since he held 75% share in GGIMS on behalf of himself and the fourth and fifth defendants;

(4) that the sum of US$3.75m was first sent to Hong Kong and then brought back and credited into his account and that he then distributed the same equally between himself, the fourth and fifth defendants; and

(5) that the plaintiffs raised the sum of US$5m for GGIMS to pay themselves management and arrangement fees.

It is relevant to note the fifth admission. Whilst the plaintiffs attempted to rely on the various admissions by the defendants, the former could not escape the admission by the latter that the plaintiffs had raised US$5m to pay themselves (the plaintiffs) back this sum as management and arrangement fees. The significance of this will become apparent much later.

MATERIAL ADMISSIONS BY THE FOURTH DEFENDANT

The fourth defendant did not deny that he had been to China earlier and had met with the second defendant and had talks with the relevant Chinese authorities. He also did not deny that the TAA was to the effect that the running of the lottery was by the foundation together with foreigners and that the government of China had not allowed another Malaysian publicly-listed company's lottery project to be set up. He also did not deny the plaintiff's allegation that he was aware of the prohibition or that he ought to have been aware of it.

Another relevant factor that was brought to my attention was that by his affidavit (encl 40), the fourth defendant had denied receiving any payment of the purchase price of the US$5m. However, after the first defendant had admitted receiving US$3.75m and distributing it equally between himself, the fourth and the fifth defendants in his affidavit (encl 45), the fourth defendant had no choice but to admit by way of his affidavit (encl 48) that he had received his share of the part purchase price of US$3.75m.

THE FOURTH DEFENDANT, THE MASTERMIND

It was the contention of the plaintiffs that the fourth defendant was the mastermind of the whole scheme to conspire and defraud the plaintiffs. The fourth defendant, on the other hand, averred that he merely introduced the parties and denied having any equity in GGIMS. However, in encl 60 he had averred that he was a partner in the project.

In encl 27, the fourth defendant specifically denied collecting 'any sum at all from the procurement fee of US$5m'. However, the plaintiffs' averment that some of the shares in the plaintiffs received by the defendants as procurement fees had been traded by the fourth defendant's wife, Ooi Chai Ngoh on the KLSE had not been denied by the fourth defendant. In any event, the fourth defendant had himself traded some of the shares in the plaintiffs received by him as procurement fee in the KLSE.

ASSETS OUTSIDE THE JURISDICTION

In respect of the fourth defendant's averment that he had no assets outside Malaysia, the plaintiffs pointed out that he had indeed received a substantial sum of money from the second defendant which he had kept in banks in Singapore in the name of his wife, Ooi Chai Ngoh. These facts were not denied by the fourth defendant and the plaintiffs, relying on *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, contended that silence in law was admission.

Regarding the first defendant's denial that he had any assets outside the jurisdiction, the plaintiffs pointed out that this was untrue since the first defendant has an apartment in Edgware Road, London. This, the plaintiffs contended, meant that the first defendant had removed the assets outside the jurisdiction and had also dissipated them.

Having referred to the evidence, the plaintiffs submitted that there was overwhelming affidavit evidence before the court for me to conclude that the defendants did combine together and acted in concert in wrongful conspiracy with each other in making false representations to the plaintiffs and thereby inducing them to enter into the commitment and shareholders' agreements and did defraud the plaintiffs of US$10m. Relying on *Bank Bumiputra v Lorrain Osman* [1985] 2 MLJ 236 at p 243, the plaintiffs submitted that at this stage of the Mareva injunction, all I had to do was to see if the plaintiffs had a good arguable case or whether there was a strong prima facie case against the defendants.

WAS THE INVITATION TO INVEST MADE TO DATO' CHAN IN HIS PERSONAL CAPACITY? A

The defendants' submission that the invitation to invest in the lottery project in Jilian was made to Dato' Chan in his personal capacity was refuted by the plaintiffs. The plaintiffs referred me to the amended defence annexed to encl 28 wherein at para 3.4, the first defendant had said that B prior to the execution of the TAA in November 1992, he, the first defendant — on behalf of GGIMS — had approached the plaintiffs and discussed the possibility and viability of the plaintiffs participating in what may be loosely termed as joint venture, whereby the plaintiffs would provide financial assistance to GGIMS by way of technical and management C services in respect of the lottery project. That suit where this admission was made is Civil Suit No D1–22–81–95 (High Court, Kuala Lumpur) ('the D1 suit') where both the plaintiffs herein sued the first and third defendants herein. In his affidavit (encl 27), the fourth defendant herein had also exhibited this same amended defence of the first defendant. In the circumstances, it was pointed out to me that the clear inference was that D the fourth defendant too had accepted the fact that the invitation was to the plaintiffs and not to Dato' Chan in his personal capacity. I was also referred to the minutes of the plaintiffs' respective board meetings held on 11 February 1993 and 12 February 1993 wherein the lottery project was discussed and wherein it was resolved that the plaintiffs would invest in the project. I had no hesitation in holding that the invitation to invest was not E made to Dato' Chan in his personal capacity but that it was indeed made to the plaintiffs.

**Case for the first and fifth defendants**

The first and fifth defendants denied that they or any of them wrongfully F and maliciously conspired with the co-defendants to injure or defraud the plaintiffs by inducing the plaintiffs to enter into the agreements. They submitted that they did not take part in any negotiations; nor did they execute the TAA. They also did not own, nor were they beneficially entitled to, any shares in GGIMS. It was also their contention that they G did not make any representations to the plaintiffs, but if made it was to Dato' Chan in his personal capacity and in any event, they did not know that the representations would be passed on to the plaintiffs. Alternatively, they honestly believed the representations to be true. They threw the onus upon the plaintiffs to have investigated properly the viability and validity of this venture before entering into it. They contended that the plaintiffs H ought to have known that the TAA was prohibited.

Since the second defendant had informed them that the TAA was not prohibited by the Chinese authorities, the first and fifth defendants assumed this to be correct.

Referring to the commitment agreement signed on 4 February 1993 I between the first and third defendants on the one part and Dato' Chan on behalf of the plaintiffs on the other, it was pointed out that the plaintiffs had agreed to inject a sum of US$22m into GGIMS — out of which a sum of US$5m would be paid to the first and third defendants or their nominees as procurement fees and the balance of US$17m was to be used for the acquisition of assets and working capital. In any event, the commitment

A agreement stated that the US$17m would be procured by the plaintiffs by way of a leasing arrangement.

The first and fifth defendants then pointed out that on the same day that the commitment agreement was signed, the first and third defendants and Dato' Chan — by a separate agreement, the collateral agreement — B had agreed that out of the sum of US$17m procured by Dato' Chan, by way of the leasing arrangement, a sum of US$5m was to be paid to Dato' Chan or his nominees. The shareholders' agreement was executed by Datin Thong Nyok Choo ('Datin Thong') for and on behalf of the first plaintiff and Dato' Chan for and on behalf of the second plaintiff. Datin Thong was at all material times and still is the wife of Dato' Chan and she C was also, at the material time, a director of both the plaintiffs. Both Dato' Chan and Datin Thong are and were at the material time substantial shareholders (directly and indirectly) of both the plaintiffs.

The first and fifth defendants thus contended that the plaintiffs had failed to establish a good arguable case which was more than capable of D serious argument. It was the submission of these defendants that since Dato' Chan, and not the plaintiffs, had entered into negotiations with the defendants, he had done so not as a nominee of the plaintiffs but in his personal capacity.

The first and fifth defendants charged the plaintiffs with suppressing E material facts in that exh CTH3 to encl 4 — which was the so-called collateral agreement whereby Dato' Chan was to receive US$5m out of the US$17m — was not disclosed by the plaintiffs. The plaintiffs contended that this piece of evidence was not relevant and therefore they did not disclose it. The defendants argued that the explanation was unacceptable.

With regard to the risk of dissipation of assets, the first defendant F pleaded that the non-disclosure of the first defendant's apartment in London had been unintentional and that therefore a mere oversight could not amount to dissipation.

The defendants also submitted that the plaintiffs, having come to seek redress after a lapse of three years, had delayed in seeking relief by G way of the Mareva injunction. The explanation of the plaintiffs that the delay was because the investigations into the conduct of the defendants only started in 1995 was totally unacceptable to the defendants.

With regard to the allegation of conspiracy, the defendants submitted that the plaintiffs had adduced no evidence to link them to the alleged H conspiracy. I was asked to disregard the admission of conspiracy made in the defence of the first defendant as having been made due to an error.

**Case for the fourth defendant**

The first contention of the fourth defendant was that there was great delay I in filing the ex parte application for an injunction.

According to the plaintiffs, the events giving rise to the plaintiffs' cause of action arose in late 1992 and early 1993 in that the defendants met Dato' Chan in December 1992 and made the invitation towards the lottery project in China. The commitment agreement was signed on 4 February 1993 whereby the plaintiffs agreed, inter alia, to purchase

67% shares in GGIMS and the shareholders' agreement was signed on 18 February 1993. Further, it was pointed out that as early as December 1993, the plaintiffs had found out that the government of China had prohibited foreign participation in technical assistance agreements. It was thus submitted that the plaintiffs' cause of action for fraud and conspiracy arose in December 1993. Since this writ was filed on 17 April 1996, the application for the Mareva injunction was filed on 7 June 1996 and the ex parte injunction was granted on 11 June 1996, the delay of almost two years and four months in filing the Mareva injunction had been unexplained. Relying on the maxim 'delay defeats equity', the fourth defendant submitted that the Mareva injunction ought not to be extended. He relied on *Hj Wan Habib Syed Mahmud v Datuk Patinggi Hj Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198, where a delay of two months was held to be long enough to defeat the grant of the injunction. It was urged upon me that the explanation that the plaintiffs had to carry out painstaking investigations to uncover the defendants' misdeeds was neither here nor there since no details of the alleged investigations were given. The fourth defendant also pointed out that on 19 April 1995, through Dato' Chan, the plaintiffs had lodged a police report against the defendants. Further in February 1995, the plaintiffs had, with regard to the purchase of 67% shares in GGIMS, filed the D1 suit against the present first and third defendants based on negligence and fraud and that the allegations in the D1 suit were in fact similar, if not identical, to the allegations in this suit.

Relying on *Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605, the defendants argued that an ex parte injunction ought not to be granted willy- nilly. Such an application ought to strictly comply with O 29 r 2A of the Rules of the High Court 1980 ('the RHC 1980'). The defendants argued that sub-paras (d) and (e) of the new r 2A had not been complied with in the instant case. It was submitted that the plaintiffs had not disclosed the existence of a private side letter whereby the same parties had agreed that out of the US$17m that was to be used for the acquisition of assets or working capital, a sum of US$5m was to be paid back to Dato' Chan or his nominee and that only US$12m was for the acquisition of assets of working expenses. The letter was exhibited as 'KEB2' to encl 19 which is the same exhibit marked 'CTH3' to encl 4. It was pointed out that this US$5m was tantamount to a 'kickback' in procuring leasing facilities which ultimately came from Talam Leasing Sdn Bhd, a wholly-owned subsidiary of the second plaintiff, of which Dato' Chan was chairman and managing director at the material time.

The response of the plaintiffs was to deny any irregularity and to contend that the US$5m was to be shared by the two plaintiffs and not intended for Dato' Chan personally. This was evidenced by way of the minutes of a board meeting which was exhibited. The plaintiffs claimed that the US$5m constituted management fees charged to their subsidiaries for work done. The defendants contended that either Dato' Chan or the plaintiffs, as agents for the second plaintiff's subsidiary, Talam Leasing Sdn Bhd, had agreed to accept US$5m from GGIMS for themselves as a reward in relation to Talam Leasing Sdn Bhd's affairs or business or in their capacity as controllers of Talam Leasing Sdn Bhd, to show favour in

relation to Talam Leasing Sdn Bhd's affairs or business and thus had committed an offence under s 4(a) of the Prevention of Corruption Act 1961.

The defendants pointed out that the plaintiffs, in support of their Mareva injunction, had disclosed to the court that a shareholders' agreement was entered into between the plaintiffs and the first and third defendants on 18 February 1993. The shareholders' agreement contains various clauses of importance to the current proceedings which appear to document the purported representation by the defendants. However, what was not disclosed to the court was the fact that there existed a supplemental agreement, which the first and third defendants averred had been executed on the same day as was the shareholders' agreement, ie on 18 February 1993. It was further pointed out that cll 3(ii), (xxiii) and (xxiv) of the shareholders' agreement were deleted in the supplemental agreement and cl 3(ii) was substituted with a clause which had the effect of stating that the first and third defendants had no knowledge of any invalidity or grounds for rescission of the TAA. Since the defendants in the earlier D1 suit had raised the supplemental agreement in their defence, it was submitted that the plaintiffs were well aware of its existence and ought to have disclosed it too.

GGIMS is now known as 'Larut Talam International Management Services Ltd' ('LTI'). The defendants by way of encl 40 (exh TSL2) pointed out a news report in *The Star* to the effect that the plaintiffs were disposing their stake in the lottery venture for US$17.84m (RM44.6m). By way of encl 37 affirmed on 4 July 1996, the plaintiffs disclosed that they had agreed to sell the same for RM45m. This affidavit was affirmed after the ex parte Mareva injunction was granted on 11 June 1996 which froze the defendants' assets up to the limit of US$22,077,701 or RM54,222,833. The upper limit was imposed by virtue of the plaintiffs' allegations that they had lost the sum. The fourth defendant thus argued that no mention was made of this agreement which would have reduced the potential damages of the plaintiffs to approximately RM9.6m and thus therefore the upper limit of the Mareva injunction should have been only RM9.6m.

The fourth defendant also submitted that the ex parte order shows that no provisions were made at all to exclude the defendants' expenditure in respect of his living expenses and/or legal costs, from the bite of the injunction. The defendants referred me to *Law Society v Shanks* The Times, 19 October 1987 (CA), [1987] NLJ Rep 1016 where the English Court of Appeal had held that a failure to provide for living expenses at all would warrant a discharge of the injunction.

The fourth defendant relied on *Motor Sports* and submitted that an order which failed to provide a maximum limit where a plaintiff claims an exact sum may be regarded as oppressive. In this case, the order granting the Mareva injunction stipulated a maximum monetary limit of US$22m or RM54m. The fourth defendant submitted that since there was an agreement to sell the assets of GGIMS — and which would have reduced the damages to RM9.6m — this order was clearly an overstatement and therefore ought not to be extended.

The fourth defendant submitted in the alternative that should I be inclined to grant the order sought, then in such a case I ought to grant the order subject to making adequate protection for the payment of legal costs of RM250,000 for the defence of this action, and reasonable living expenses of RM5,500 per month.

The fourth defendant submitted that the D1 suit was similar to the present suit, shorn of its details. He accepted that the current suit was a claim for conspiracy to defraud. However, the content of the alleged conspiracy is essentially the alleged misrepresentation by the defendants upon which the plaintiffs relied, and which had the effect of inducing the plaintiffs' involvement with the lottery project in Jilian. Underpinning the allegation of conspiracy to defraud in the present suit is the alleged misrepresentations, which formed the basis of the D1 suit. Since this suit is a duplicity of the D1 suit, it was pointed out to me that being an abuse of process it ought to be struck out and thus I should refrain from granting an order extending the Mareva injunction. The fourth defendant also argued that the plaintiffs' offer to stay the D1 suit subsequent to the granting of the initial Mareva injunction was of no consequence in the light of the decision in *Motor Sports'* case which stated that a subsequent offer to 'make amends' does not rid the initial tainted order of its taint.

On the question as to whether there was any risk of dissipation of assets, the fourth defendant submitted that when applying for the Mareva injunction the plaintiffs had no evidence whatsoever of proving such a risk, which was an essential element to establish before obtaining a Mareva injunction. The fourth defendant relied on *Bank Bumiputra (M) Bhd v Lorrain Osman & Ors* [1985] 2 MLJ 236. In that case, the trial judge held that there was evidence of risk of disposal by Lorrain Osman. Lorrain obtained a £200,000 loan which was remitted to his solicitors in London. There was evidence that Lorrain planned to dispose of his shares through a firm of stockbrokers. The plaintiff's solicitors had great difficulty in serving cause papers on him. Despite attempting service at his home address and the addresses of his companies, nobody seemed to know of his whereabouts. Lorrain informed Bank Bumiputra that monies owing to him by way of director's fees should be credited to the account of a certain company. Despite agreeing to cooperate with a committee of inquiry appointed by Bank Bumiputra to investigate the BMF affair and to answer a written questionnaire in writing, Lorrain failed to respond despite three reminders. Further, despite the wide publicity of the BMF affairs, Lorrain had not entered any appearance to the suit against him. The learned judge's decision was upheld by the (then) Supreme Court in *Aspatra Sdn Bhd & Ors v Bank Bumiputra (M) & Anor* [1988] 1 MLJ 97.

The fourth defendant argued that the plaintiffs should give some grounds for believing that there was a risk of the assets being removed before the judgment or award was satisfied. As against this, the plaintiffs argued that there was a real risk of dissipation because the defendants had defrauded the plaintiffs and received monies from the plaintiffs. The defendants' reply was that the question of fraud was to be determined at trial. The fourth defendant further submitted that he is a Malaysian citizen domiciled here with no right of abode in any other country; nor had he

A applied anywhere for any such right and had no assets outside of Malaysia and had his immediate family residing in Malaysia and had his business located wholly in Malaysia. In the circumstances, it was argued that a grant of the Mareva injunction was inappropriate as against him.

At to whether the plaintiffs had a good and arguable case, the fourth B defendant submitted that other than the shareholders' agreement, the plaintiffs had merely relied on oral representations made by the defendants. However, the fourth defendant argued that the shareholders' agreement had no basis because of the supplemental agreement.

Finally, the fourth defendant contended that the Mareva injunction C obtained by the plaintiffs covered all assets of the fourth defendant whether within or without the jurisdiction and since the plaintiffs had failed to prove that the fourth defendant had assets out of the jurisdiction, the Mareva injunction ought not to be extended.

**Findings of the court**

D There is no doubt in my mind that the first defendant, being the brother of the second defendant, had knowledge of the plans of all the defendants. The fifth defendant, being a computer expert with a doctorate, was no simpleton. His background knowledge into the running of the 'Empat Nombor Ekor' lottery was no doubt his reason for joining the defendants E because his sole purpose was to assist in the running of the lottery. I also have no doubt that the first, fourth and fifth defendants met the second defendant in China and discussed the lottery project. I also find as a fact that from December 1992, the first, fourth and fifth defendants had meetings, discussions and negotiations with Dato' Chan and his group with regard to his lottery project. I also find as a fact that the defendants F invited the plaintiffs to buy the controlling shares in GGIMS for the sum of US$5m. The first and fifth defendants cannot escape the conclusion that they were aware of the feasibility study presented by the defendants to the plaintiffs in late December 1992 or early January 1993. The first and fifth defendants cannot deny knowledge of the TAA because it was entered G into by GGIMS and the foundation to assist the foundation in the running of the lottery.

For the purpose of this application, I do not have to go into the merits of the case. Suffice it to find from the facts narrated in extenso that all the defendants knew that the Chinese government would not agree to H the lottery project because of the earlier rejection of a similar application by the Berjaya Group. These defendants were also aware of the commitment agreement because they shared the spoils. Even though the second defendant knew in March 1993 that the Chinese government had prohibited the lottery project, I find that this knowledge — which no doubt was known by all the defendants — was kept away from the plaintiffs. The very pertinent I admissions of the first and fifth defendants, which have been referred to earlier, must bind them. Any explanation with regard to the propriety of relying on these admissions made in the submissions of the first and fifth defendants is unacceptable in the absence of an affidavit retracting the said admissions.

There is no doubt that the plaintiffs had made out a case. However, the plaintiffs had failed to disclose the existence of the supplemental agreement which was signed on the same day as the shareholders' agreement. This is a material non-disclosure. As for the reason why it is material, I shall deal with it when I deal with the case against the fourth defendant because the reasoning will apply to all these defendants.

It is clear that the fourth defendant had also received his share of the US$3.75m as admitted by him. I also find from the affidavits that the fourth defendant had earlier maintained that he was only an introducer of the parties to one another but later admitted that he was a partner of the defendants. I also find as a fact from encl 66 that the fourth defendant did in fact receive part of the shares of the plaintiffs as procurement fee which he traded in the KLSE. His submission that the plaintiffs had breached O 41 r 5(2) of the RHC 1980 by not stating their source of belief is unacceptable. Order 41 r 5(2) reads:

> An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

I hold that in interlocutory proceedings, a party affirming an affidavit may make statements of information or belief. If the party fails to particularize its sources or grounds of belief, then such failure merely goes to the weight that I ought to attach to such averments. It was open to the fourth defendant to have denied the plaintiffs' averments and in any case the ball was back in the court of the plaintiffs to take the challenge by producing their sources of belief. The non-denial of this part of the affidavit by the fourth defendant must mean that he was not prepared under oath to deny this fact. The same argument would apply to the plaintiffs' contention that the fourth defendant had received a substantial sum from the second defendant and that his wife, Ooi Chai Ngoh kept this in her bank account in Singapore. The fourth defendant ought to have denied this if it was not true. After all, if it is not true — and the plaintiff would have had no means of proving this — the fourth defendant would have no cause for concern. I find that his refusal to deny gave rise to a cause for concern, which was a fear of denying under oath something he was unable to deny. Further, the affidavits of the plaintiffs were prefaced with the averment of personal knowledge. In order to ascertain as to whether the averments were based on personal knowledge or on information or belief, the defendants ought to challenge the same by a denial, thus forcing the plaintiffs to state their source of belief, if the averments were based on these.

The important point to remember is that the representations complained of that are most material to the case were made *before* and/or at the time of entering into the commitment agreement and the shareholders' agreement. The contents of the commitment agreement and the shareholders' agreement are relevant to show that the plaintiffs had acted on the agreements in carrying out their obligations under those agreements and paid out US$10m to the defendants as a result of the conjoint effort of the defendants to induce the plaintiffs to enter into this project. I find that the warranties and representations contained in the shareholders' agreement as evidence of the representations made by the defendants in conspiracy with each other were made *prior* to the execution of the

A shareholders' agreement and that they led and/or induced the plaintiffs to enter into the commitment and shareholders' agreements.

DELAY

As to the argument of delay raised by the defendants, I find that the
B plaintiffs' case was unique in itself. In this case, there was no question of restraining the defendants from performing any wrongful act or from continuing with it. The admitted facts show that the plaintiffs had indeed paid out US$10m to the defendants and suffered loss and damage by not getting the lottery project. The mere act of delay, even if there was, is not
C per se a factor which militates against the grant of an injunction. The maxim 'delay defeats equity' must not be applied with the blindfold that symbolises justice. The facts of each case must be looked into. I hold that for delay to operate as a bar, it is essential that it should prejudice the defendants. From the facts of this case, in no way whatsoever were the defendants disadvantaged by the delay. In fact, the delay in this case had
D acted to the defendants' benefit since they have had the use of the money for the length of the delay. On the contrary, it is the plaintiffs who are out of pocket for a large sum of money. In fact, the plaintiffs discovered in December 1993 that the TAA was invalid. By that time, the plaintiffs had suffered loss and damage amounting to about RM54m and the defendants had gained US$10m. The sole purpose of the Mareva injunction is to
E prevent a plaintiff from being deprived of the proceeds of an action, should it be successful, by the defendant transferring assets out of the jurisdiction or dissipating assets within the jurisdiction.

In exercising its discretion in granting or refusing an injunction where delay is raised, the court must consider:

F

(1) whether in all the circumstances of the case and with particular regard to the facts before the court, there was a delay in the making of an application;

(2) if there was a delay, whether the applicant had given an explanation in his affidavit to the court; and

G

(3) if so, whether the delay in such a case was reasonable. If the court finds that the delay was reasonable, then it will exercise its discretion to grant the interlocutory injunction provided the ingredient of real injustice is present.

H I find that the plaintiffs had raised sufficient evidence to warrant the grant of the Mareva injunction. I hold that the higher the degree of success the greater the need to protect the assets of the defendants by a Mareva injunction.

Based on encl 4, I find that the plaintiffs only started their investigations in 1995 when they obtained the relevant documents. Although the plaintiffs had learnt in December 1993 that the TAA was invalid, they
I did not know what had transpired between the defendants and the foundation. Besides, the defendants were holding more than US$11m worth of computers and the building which the plaintiffs had bought for more than US$600,000. The plaintiffs' main concern in 1994 was to preserve the property worth millions. Since the allegation was one of conspiracy, the plaintiffs needed sufficient evidence before proceeding

against the defendants. I have also to consider the fact, which was in evidence, that the defendants were protected by Chinese officials including the second defendant and the secretary to the foundation. There is evidence that in April 1994, the second defendant had appropriated computers and related equipment for his own use and took possession of the building and had evicted the plaintiffs and their employees. The sordid details of this seizure by the second defendant are contained in exh CTH20 to encl 66 which are the minutes of the board of directors' meeting of GGIMS held on 27 May 1994. In the meantime, the plaintiffs were continuing with their talk with the Chinese government to salvage the aborted lottery project. When this failed, the plaintiffs made the police report on 19 April 1995. In the meantime,the Malaysian Police too made their investigations and in January 1996 one Chuah, the executive director of the first plaintiff had to accompany the police to China to help in their investigations. I accept the plaintiffs' explanation that they waited for the Malaysian Police to complete their investigations before filing these proceedings.

In view of the strictures that apply to a plea of conspiracy in that it ought to be pleaded with great particularity — and bearing in mind the requirement of the standard of proof in respect of a plea of conspiracy and further bearing in mind that all these acts were committed in a foreign land — I am satisfied with the plaintiffs' explanation in respect of the delay.

BREACH OF O 29 R 2A OF THE RHC 1980 (NON-DISCLOSURE)

*The side letter*

On this score, I find for the defendants. The defendants argued that exh KEB2 to encl 19 was a vital document that ought to have been disclosed before the plaintiffs applied for the ex parte Mareva injunction. I agree. The plaintiffs' submission that this document or side letter — whereby the same parties had agreed that out of the US$17m that was to be used for the acquisition of assets or working capital, a sum of US$5m was to be paid back to Dato' Chan or to his nominees — was not a material document was ill-founded. It is my finding that if this document had been disclosed, it would have had a great influence on this court in deciding whether or not to grant that ex parte order.

The plaintiffs contended that the side letter only set forth the mode and schedule of payments to the defendants and also included a provision for payment of management fees to Dato' Chan or to his nominees for procuring the leasing agreement. The plaintiffs submitted that the defendants, being aware of their difficulty in raising such a large amount, willingly entered into the commitment agreement. Was this the reason for the defendants to have agreed to pay back US$5m out of the US$17m? The side letter needs looking into. A claim of US$5m for procuring a sum of US$17m is tantamount to charging management fees amounting to about 30% of the loan. The defendants contended that this payment was a 'kickback'. If the defendants' submission is to have no force, as argued by the plaintiffs, then I see no reason why this side letter was not disclosed and an explanation given as to why it was entered into. Even if I were to reject the defendants' submission on this issue, I could not overlook the

fact that Dato' Chan, who agreed to accept this sum, presumably as the minutes now show as having been accepted on behalf of the two plaintiffs to be shared equally as being management fees charged to their subsidiaries for work done, could have easily disclosed this fact in the side letter. After all, it ought not concern the defendants as to whom the money went so long as it was properly disclosed. I had already found earlier, based on the evidence tendered, that Dato' Chan had contracted for the plaintiffs and not for himself personally. Whilst it is not my province at this stage to decide whether the sum of US$5m constituted a legitimate management fee or a 'kickback', the conduct of the parties and the manner in which the release of this sum was effected and the non-disclosure of the side letter warrants the discharge of the initial ex parte order granting the Mareva injunction. I do not find the explanation of the plaintiffs with regard to the said side satisfactory. Bearing in mind that the side letter was signed together with the commitment agreement, this management fee element relating to the side letter could easily have been reflected in the commitment agreement.

Again, there was no mention of this management fee element in the shareholders' agreement. Since the commitment agreement itself catered for the signing of the shareholders' agreement, the absence of any reference to the side letter leaves a cavernous void in the plaintiffs' case. Order 29 r 2A of the RHC 1980 was introduced for a specific purpose and with specific reference to ex parte applications. The need for full and frank disclosure at the ex parte stage has now been enshrined in the rules. Such rules cannot be treated as mere pedantic verbiage. They must be strictly complied with by the parties and enforced by the court. It is my finding that the plaintiffs had indeed breached this rule.

*The shareholders' agreement and the supplemental agreement*

The purpose of signing both these agreements on the same day is a cause for concern; more so when in the supplemental agreement — as pointed out by the defendants — relevant clauses from the shareholders' agreement were deleted and substituted with a clause which had the effect of stating that the first and third defendants had no knowledge of any invalidity or grounds for rescission of the TAA. The plaintiffs, on the other hand, contended that the supplemental agreement was prepared at the insistence of the first, fourth and fifth defendants and remained unexecuted as it was not agreed to by the plaintiffs. The first defendant, however, had averred that he had executed the agreement in the law office of Hamzah Abu Samah & Partners. This conflict of affidavit evidence can only be resolved at trial. However, I find that the plaintiffs knew at the time they obtained the Mareva injunction that the defendants would be raising the supplemental agreement in answer to the plaintiffs' claim. This is so from the amended defence of the first and third defendants in the D1 suit. It is my judgment therefore that the existence and purpose of the supplemental agreement ought to have been disclosed.

*Non-disclosure of the existence of an agreement to sell the plaintiffs' investment for RM44.6m*

Exhibit TSL2 to encl 40 is a news report in *The Star* confirming that the plaintiffs were disposing their stake in the lottery venture for US$17.84m (RM44.6m). However, by way of encl 37 affirmed on 4 July 1996 the plaintiffs disclosed that they had agreed to sell the same for RM45m. The plaintiffs submitted that there was non-disclosure of this fact because when the suit was filed on 16 April 1996 and the application for the Mareva injunction filed on 7 June 1996 nothing had been finalized in respect of this sale. However, I find that the minutes of the 1996 annual general meeting of LTI held on 10 June 1996 showed that the board of directors of LTI had agreed to dispose of LTI to a third party in order to raise funds to repay its creditors and advances from major shareholders. A majority had voted for the motion and the chairman had declared the motion duly passed as an ordinary resolution of the company. It is my finding that as the Mareva injunction was granted on 11 June 1996, disclosure of these minutes ought to have been made to this court. Further, the minutes express the fact that the board of directors of LTI had, prior to the annual general meeting, already approved the sale. This too was not brought to the attention of the court.

In *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 at p 155, Mohd Azmi SCJ (now FCJ) said in relation to the principle of frank and full disclosure in Mareva injunction:

> Further, in presenting affidavit evidence to establish the necessary ingredients for an ex parte order for a Mareva injunction, it is incumbent on the applicant to make frank and full disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the ex parte application would invariably be fatal. On this particular point we approve the judgment of VC George J in *KSM Credit & Leasing Sdn Bhd v Data Mante (M) Sdn Bhd & Ors* ([1986] 1 CLJ 500) on the applicability of the principle of frank and full disclosures in all ex parte application for Mareva injunctions.
>
> It is of utmost importance that the remedy of a Mareva injunction should not be abused. The caution for the benefit of the solicitors for the City of London given by Lord Denning MR in *Third Chandris Shipping Corp & Ors v Unimarine SA* ([1979] 2 All ER 972 at p 985) had been quoted with approval in *Aspatra*'s case at p 104 and we wish, with respect, to adopt the same caution for the benefit of the solicitors in this country.

THE MAREVA INJUNCTION

The basic premise upon which the Mareva injunction is grounded lies in equity. The Mareva injunction was developed essentially to prevent an abuse or injustice manifesting itself in the form of a defendant who deals with his assets in manner so as to deliberately thwart any judgment which may be obtained against him. In *PCW (Underwriting) Agencies Ltd v Dixon & Anor* [1983] 2 All ER 158, Lloyd J opined at p 162:

> The sole purpose or justification for the Mareva order is to prevent the plaintiffs being cheated out of the proceeds of their action, should it be successful, by the defendant either transferring his assets abroad or dissipating his assets within the jurisdiction.

Abdoolcader FJ, sitting in the Federal Court in *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62, cited Lloyd J in *PCW* with approval. Thus the rationale for interim relief in the form of a Mareva injunction in Malaysia is no different from that in England. In *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143 at p 147 Edgar Joseph Jr J (as he then was) emphasized that the court's jurisdiction to grant Mareva injunctions was grounded in equity. Riding on these basic premises, I find that case law has established the following principles, namely:

(1) that the Mareva injunction is not intended to punish the defendant but is intended to do justice to all parties. In *CBS UK v Lambert* [1983] Ch 37 at p 43, Lawton LJ said:

> Even more hardship might be caused to a defendant who was deprived by a Mareva injunction of assets which he used for the purpose of living and earning his livelihood. Even if a plaintiff has good reason for thinking that a defendant intends to dispose of assets so as to deprive him of his anticipated judgment, *the court must always remember that rogues have to live and that all orders, particularly interlocutory ones, should as far as possible do justice to all parties.* (Emphasis added.)

(2) that in the exercise of the Mareva injunction a plaintiff should also be mindful of the legitimate interests of a defendant and the grant of the injunction must not be oppressive in its outcome to the defendant.

In *Derby v Weldon (Nos 3 & 4)* [1990] Ch 65, Neill LJ said at p 93:

> The legitimate interests of the defendant must be respected and he must be allowed to continue his normal business and to have funds to meet his reasonable living expenses.

and Butler-Sloss LJ said at pp 96–97:

> The grant of such remedies against defendants must not be oppressive in its outcome. Specific terms or undertakings should therefore generally be part of any worldwide, pre-judgment Mareva. The conditions imposed in the wording of the order must balance on the one side the need to freeze the assets in question and gain the information required against restrictions to protect the defendants, inter alia, from unjustified results in other jurisdictions, a misuse of the information gained or an unwarranted invasion of privacy and to permit them to have funds to continue business and to meet reasonable living expenses.

These same sentiments have been echoed in *Motor Sports*.

*The oppression*

(a) Failure to provide for living expenses and legal costs

I accept the fourth defendant's submission that the Mareva injunction as granted is oppressive. I find that the said order failed to make provision for the fourth defendant's living expenses and legal costs and that it also overstated the maximum monetary limit of the injunction's intended coverage. I accept and adopt the decision of the English Court of Appeal in *Law Society v Shanks* The Times, 19 October 1987, [1987] NLJ Rep 1016 wherein Sir John Donaldson MR said:

> The order made was breathtaking in its width, and read literally, as all injunctions were meant to be, especially if there was a penal notice at the end, prevented Mr Shanks from buying even a loaf of bread or having his ordinary expenses.
>
> The order was plainly wrong in that respect. *Mareva injunctions should always make provision for living expenses unless it was known that a defendant had other funds.* So too in the ordinary run-of-the-mill cases, there should be provision for the defendant to pay his ordinary debts as they became due. (Emphasis added.)

It cannot but be sound law that a failure to provide for living expenses and the payment of ordinary debts as they become due, in an order for a Mareva injunction, ought to be valid grounds to discharge that order. This must be so to obviate the obvious injustice occasioned to a defendant who, upon being served a Mareva injunction obtained ex parte, is barred from that point in time from expending any money of his own whatsoever in connection with what is merely necessary as living expenses in circumstances such as the present, where the Mareva injunction was said to attach to all of the defendants' assets to a maximum sum of approximately RM54.2m. In fact, the provisions in respect of living expenses and legal costs are commonly found in Mareva injunction orders and this has been recently endorsed by a Practice Direction issued in England standardizing orders in relation to Anton Piller and Mareva injunctions; see Practice Direction [1994] 4 All ER 52 at p 60. It would not be inappropriate for similar Practice Directions with necessary modifications to be implemented in Malaysia. The soundness of a provision for the defendant to employ funds in relation to his legal costs in defending the suit has also been acknowledged in *Derby v Weldon (Nos 3 & 4)* where Lord Donaldson MR said at p 76:

> ... it is not its [a Mareva injunction's] purpose ... to impede him in any way in defending himself against the claim.

(b) Overstatement of maximum upper limits

In *Motor Sports*, the Court of Appeal — in holding that an order which fails to provide a maximum limit where the plaintiff claims an exact sum may be regarded as oppressive — stated at pp 611–612:

> Now, it is a well-established principle governing Mareva injunctions that they ought not to place a restraint upon a defendant more than is absolutely necessary (see *Searose Ltd v Seatrain (UK) Ltd* [1981] 1 WLR 894 at p 897, per Robert Goff J). In a case such as the present, where the amount of the

A claim has been quantified, it is necessary for the order of court to sufficiently identify the upper limit of the sum that is sought to be protected by the injunction. As Lord Denning observed in *Z Ltd v A-Z & AA-LL* [1982] 1 QB 558 at p 576:

> 'In other cases, however, it may still be desirable to insert a maximum amount in the general injunction as against the defendant himself. But, B as this is unworkable against a bank, it would at the same time be desirable to add a special injunction restraining the defendant from disposing of any of the sums standing to the credit of the defendant in a specified bank account in excess of the maximum; or from disposing of any item deposited with the specified bank for safe custody. The reasons being that every bank or other innocent third party should C know exactly what it should or should not do.'

In *Motor Sports* itself, the failure to state a maximum sum was held to render the order oppressive and the order was thus set aside on this ground amongst others. It is my judgment that a fortiori, where a maximum limit is provided for, that maximum limit must as far as possible be accurately D stated and in any event certainly not overstated. Once it is remembered that a Mareva injunction should not place a restraint on a defendant more than is absolutely necessary, I find that this proposition is merely a logical extension of the principle stated in *Motor Sports*. In the present case, the Mareva injunction order stipulated a maximum monetary limit of US$22m or RM54m. The plaintiffs' application to continue the injunction made no E attempt whatsoever to reduce this sum. I find that this is a gross overstatement of the exact sum claimable by the plaintiffs by way of special damages in so far as the plaintiffs have failed to disclose the sale which would have reduced this sum to approximately RM9.6m only.

F MULTIPLICITY OF ACTIONS

It is clear that the cause of action in the D1 suit was in contract for a breach of the shareholders' agreement. The cause of action in this suit is grounded in the tort of conspiracy and covers all five defendants. It is not limited to just the two defendants being the parties referred to in the G shareholders' agreement. The claim here both for special and general damages far exceeds that of the claim in the D1 suit. It is my finding that there was no multiplicity of actions in this case. In any case, even if I am wrong in this, I accept and adopt as sound law the decision of Mahadev Shankar J (as he then was) in *Esa bin Sa'yon v Woon Kim Poh* [1985] 2 CLJ 382 at p 398 where on an application to set aside the Mareva injunction on H the ground of non-disclosure of material facts — and after considering the facts and the plea of multiplicity of actions — the learned judge ordered the two actions having 'common questions of law and fact' to be heard one immediately after the other unless consolidated.

In the light of the evidence adduced and the non-disclosure by the I plaintiffs of matters earlier referred to by me, I discharged the injunction granted ex parte on 11 June 1996 and ordered an enquiry as to damages to be heard after the trial.

REAL RISK OF DISSIPATION OF ASSETS

The Court of Appeal in *Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83 decided that the conduct of the defendant has to be looked at when considering the questions as to whether there is a real risk of dissipation of assets. If the conduct of the defendant is lacking in probity and honesty upon considering the evidence, then there is a real risk that the assets of the defendant will dissipate should the plaintiffs succeed at trial. Again, in *Amixco Asia Pte Ltd v Bank Negara Indonesia* 1946 [1992] 1 SLR 703, the Singapore Court of Appeal decided that there was overwhelming objective evidence of prima facie dishonest conduct on the part of *Amixco*, and in the circumstances, there was a real risk of *Amixco* dissipating their assets to avoid satisfying Bank Negara Indonesia's judgment. Having gone through the entire facts, there is sufficient evidence before me to hold that there was a real risk of the defendants dissipating their assets. The conduct of the defendants clearly lacked probity.

GOOD ARGUABLE CASE

The plaintiffs had provided evidence that the defendants had assets within the jurisdiction and I have already found that there was a real risk of dissipation of assets. The defendants had collected a very large amount of money from the plaintiffs in respect of the purchase price of the controling shares in GGIMS and also as procurement fees. The three defendants had denied at first that they had received any share of the purchase price or any shares in the plaintiffs as procurement fees. Subsequently, they admitted receiving their shares of the purchase price and the procurement fees. The first and fourth defendants also said that they had no assets outside the jurisdiction of the court. The plaintiffs had shown that the first defendant has an apartment in London. I find that there was already dissipation of assets since half the share of the apartment is registered in his wife's name and since no evidence was led that she bought her share out of her own funds. The fourth defendant had not denied that he received substantial sums of money from the second defendant from Hong Kong which was banked into his wife's account in Singapore. These facts, together with the rest of the evidence before me, clearly point to a good and arguable case for the plaintiffs.

OUGHT THE COURT TO GRANT A FRESH INJUNCTION

There is no doubt in my mind that both parties had hands that were tainted with their own inequities. Neither party had come to court with clean hands. If the defendants contended that the sum of US$5m constituted a 'kickback' and that even if Dato' Chan was not to receive the same but that it ought to be divided between the two plaintiffs, the defendants themselves could not explain their conduct in agreeing to give the sum of US$5m to the plaintiffs which they contended was a kickback.

When the inequities of both parties are equal, in my view it would be a travesty of justice if I do not consider the question as to where the justice of the case lies. At this stage, I have to consider all the affidavits filed by both the parties (see *Aspatra Sdn Bhd v Bank Bumiputra* [1988] 1 MLJ 91). In

*Lloyds Bowmaker Ltd v Britannia Arrow Holdings* [1988] 3 All ER 178, the Court of Appeal held that the court has a discretion to grant a second injunction, after discharging the earlier injunction, when all the facts are placed before it. It further held that the second injunction may well be granted if the non-disclosure was innocent and that the injunction could properly have been granted on the disclosed facts. Certainly, there was no question of any innocent non-disclosure in this case and based on the totality of the facts as laid out by the plaintiffs, the plaintiffs are not entitled to a second injunction. But having considered the facts as laid out against the defendants themselves, I must hold that justice requires that a fresh injunction be granted. The real issue I have to consider now is not what has happened in the past but what should happen in the future. This court cannot be used as an instrument to perpetrate an injustice. The plaintiffs had paid out US$5m to the defendants who had admitted receipt of this sum. The plaintiffs are publicly-listed companies and the funds are that of the shareholders. It is necessary that notwithstanding the conspiracy or fraud or corrupt practices of the *dramatis personae* to this action, the funds of the investors be protected. Towards this end, I granted a fresh Mareva injunction against the defendants limited to the sum of US$5m only.

I also ordered disclosure of assets by all these defendants limited to the sum of US$5m jointly with liberty to apply. I also ordered such disclosure to be made within 40 days of this order.

This was an appropriate case to order each party to pay its own costs.

The parties by consent then agreed to vary the order by providing a sum of RM250,000 as legal costs in respect of each set of solicitors for the three defendants. They had earlier by consent agreed to the sum of RM5,500 as living expenses for each defendant.

*Order accordingly.*

Reported by Lew Chee Seong